LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV. 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-357

SANDERS BRINE SHRIMP COMPANY,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Clifford L. Ashton
Haldor T. Benson
141 East First South
Salt Lake City, Utah 84111
Counsel for Respondent

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT	3
POINT I THE CIRCUIT COURT'S AMENDED DECISION RENDERS THE PETITIONER'S EXCLUSIVITY AND DUE PROCESS ARGUMENT HEREIN MOOT	3
POINT II PETITIONER'S ARGUMENT THAT *ERIE RAILROAD CO. V. TOMPKINS* SHOULD BE REVERSED FOR THIS CASE IS WITHOUT RECORD SUPPORT, BASIS OR PRECEDENT	6
CONCLUSION	7
APPENDIX	
A. AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT	A-1
B. PETITION FOR REHEARING; MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME AND FOR ENLARGEMENT OF TIME; APPEARANCE OF COUNSEL	B-1
C. EXCERPTS FROM PETITIONER'S OPENING AND REPLY BRIEFS TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT	C-1

TABLE OF CONTENTS (Continued)

Page

CASES CITED

Adikes v. S. H. Kress Co., 398 U.S. 144 (1970) 7

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 6

Graver Tank Mfg. Co. v. Linde Air Products, 336 U.S. 271, 275 (1949) 3

Husty v. United States, 282 U.S. 694, 701-702 (1931) 7

Lawn v. United States, 355 U.S. 339, 362-363 7

Morton International v. Southern Pacific Transportation Company, 27 Utah 2d. 495 P.2d 31, cert. denied, 409 U.S. 934 (1972) 2, 6

Owens v. Union Pac. R. Co., 319 U.S. 715 (1943) 7

United States v. Johnston, 268 U.S. 220, 227 (1925) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-357

SANDERS BRINE SHRIMP COMPANY,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent Southern Pacific Transportation Company (hereinafter "Southern Pacific") hereby prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by Sanders Brine Shrimp Company (hereinafter "Sanders") be denied by the Court.

OPINIONS BELOW

The judgment of the United States District Court for the District of Utah was not reported nor was there a written opinion. The Findings of Fact, Conclusions of Law and Judgment of that Court are appended as Appendix B and Appendix C, respectively,

to the Petition herein. The original Opinion of the Court of Appeals for the Tenth Circuit, not yet reported, is appended as Appendix A to the said Petition.

The Amended Opinion of the Tenth Circuit, also not yet reported, is appended as appendix A hereto.

QUESTIONS PRESENTED FOR REVIEW

The questions argued at page 2 of the Petition herein are either moot or provide the Petitioner no basis for granting the Writ which it seeks, as discussed hereinafter.

STATEMENT

Petitioner herein asks the Court to review a decision of the Tenth Circuit Court of Appeals entered July 26, 1974. That decision affirmed the judgment of United States District Court for the District of Utah which dismissed the Petitioner's Complaint, as well as the complaints of two other plaintiffs.[1] Insofar as the Petitioner, Sanders, is concerned, the Federal District Court concluded that the decision of the Utah Supreme Court in *Morton International, Inc. v. Southern Pacific Transportation Company*,[2] was controlling and that, as a matter of state law, Petitioner had no standing upon which to base its claim.

Following the Court of Appeals decision of July 26, 1974, Petitioner asked the Court of Appeals for permission to late file a Petition for Rehearing on September 13, 1974. Its proposed Petition for Rehearing was filed the same date.[3] The Circuit Court, on September 27, 1974, allowed the out of time filing; amended its original decision and denied the Petition for Rehearing.

---

[1] Hardy Salt Company and Morton-Norwich Products, Inc.

[2] 27 Utah 2d 256, 495 P.2d 31, cert. denied, 409 U.S. 934 (1972); appended as Appendix E to the Petition herein.

[3] Copy appended hereto as Appendix B.

ARGUMENT

POINT I

THE CIRCUIT COURT'S AMENDED DECISION RENDERS THE PETITIONER'S EXCLUSIVITY AND DUE PROCESS ARGUMENT HEREIN MOOT.

The principle ground advanced by Petitioner for the granting of the Writ which it seeks, surprisingly enough, is the charge that the Court of Appeals "misapprehended" the facts and the grounds upon which Petitioner asserted its claim in the trial court. Petitioner contends that the Circuit Court did not consider the evidence regarding the "exclusive" nature of certain of its asserted rights, and that Petitioner was therefore deprived of property without due process of law. For Petitioner to make this assertion as the basis for requesting the issuance of a writ of certiorari is surprising for at least two reasons. In the first place, as Petitioner acknowledges, this Court does not grant certiorari to review evidence and discuss specific facts.[4] And this is particularly true in a case such as this one where both the trial court and the Court of Appeals made concurrent findings of fact.[5]

Secondly, the substance of the charge made by Petitioner is directly contrary to Petitioner's arguments before the Court of Appeals. The charge now made is that the Court of Appeals overlooked or "misapprehended" the fact that Petitioner contended that its right to seine for brine shrimp and their eggs in the Great Salt Lake was an *exclusive right* rather than non-exclusive as it was characterized in the Court of Appeals decision.[6] To the extent that the Court of Appeals did characterize Petitioner's seining rights as non-exclusive in its original opinion, it was led directly to that result and away from special concern for the alleged ex-

---

[4] *United States v. Johnston*, 268 U.S. 220, 227 (1925).
[5] *Graver Tank Mfg. Co. v. Linde Air Products*, 336 U.S. 271, 275, (1949).
[6] Pet'n., pp. 2, 6, 7, 8, 11.

clusivity of Petitioner's rights by Petitioner's own briefs to the Court. In its opening brief to the Court of Appeals, Petitioner advised the Court of the significance which it attached to the alleged "exclusiveness" of its rights as follows:

> "We do not consider the exclusivity *vel non of* Appellant's harvesting rights (in view of its long history of continuous successful operation) to be crucial in this proceeding." (Petitioner's Opening Brief, pp. 10, 11).

And, if that instruction to the Appeals Court were not enough to distract its attention from the question of the now alleged exclusivity of Petitioner's rights, the question was removed completely by Petitioner's Reply Brief to the Court. Petitioner there argued:

> "The rights Appellant here asserts are *not contractual, they are statutory.*[7] Appellant's licenses and easements from the state are merely an ingredient of the 'property' devalued by Appellee's conduct, *they are not the source* of Appellant's rights. Appellant here asserts *public* rights, the public right proclaimed by statute that the public waters shall not be changed in their physical, chemical and biological characteristics to the detriment of industrial or recreational uses or aquatic life, the public right that public mineral, biological, and recreational resources shall be respected. It is the very non-exclusivity of these rights that imparts their public character."[8] (Emphasis Added.) (Petitioner's Reply Brief, p. 3).

The changing of gears resulting in the directly contradictory position now taken by Petitioner commenced shortly before the

---

[7] Compare the contradiction in the Petition herein: "Petitioner is not requesting the interpretation of any state or federal statutes.

* * * * *

[T]he sole basis for (Petitioner's) rights was the contract appended to this Petition as appendix D . . . ." (Petition, pp. 2, 10).

Copies of the pertinent pages of Petitioner's Opening and Reply Brief are appended hereto as Appendix "C".

[8] It should be noted that the public was well represented before the Court of Appeals. Both the United States and the state of Utah appeared as amicus curiae and filed briefs in support of the District Court's decision in favor of Respondent.

present Petition was filed with the Court. On September 13, 1974, Petitioner filed its belated request with the Court of Appeals for a rehearing, asserting the Court's alleged misapprehension of Petitioner's rights. The *argument regarding the alleged* exclusivity of Petitioner's rights now made to this Court is substantially the same as the argument made to the Court of Appeals in Petitioner's request for rehearing.

The Court of Appeals, while allowing the late filing, denied the Petition for Rehearing on September 27, 1974. However, the Court removed any doubt as to whether or not it had considered Petitioner's exclusivity argument by amending its original opinion. At pages 4 and 17 of the amended decision, (Appendix A pp. A-3, A-4, A-13) the Appeals Court found that Petitioner had exclusive rights to seine for and harvest brine shrimp and brine shrimp eggs in two designated areas on the Great Salt Lake.

The Court concluded, however, that that made no difference insofar as Petitioner's standing was concerned.

> "The claims of Sanders are likewise untenable. As stated above, it is true that under its contract with the State, Sanders does have an exclusive right to seine and harvest in two designated areas, one other company having a right to collect a limited amount of shrimp in one of the two areas. However, Sanders' rights to seine and harvest are only a right to reduce to possession and therefore are analogous to a profit a prendre and other like rights mentioned in the *Morton* opinion . . . . We feel . . . . that the rights of Sanders still come within the rationale of the *Morton* opinion and that the District Court did not err in deciding that Sanders lacked an enforceable right." (Appendix A, p. A-13).

In view of the facts that Petitioner concedes that *Morton* could be read to encompass alleged "exclusive" rights,[9] and that

---

[9] Petition, p. 15, n. 39.

"Petitioner does not wish the Court to review the Tenth Circuit's determination of the rules of law to be gleaned from *Morton International*,"[10] Respondent submits that the foregoing discussion demonstrates that the issue raised by Petitioner concerning the Circuit's consideration of exclusive rights and the resultant argument concerning due process are moot, and the Petition should be denied.

POINT II

PETITIONER'S ARGUMENT THAT *ERIE RAILROAD CO. V. TOMPKINS*[11] *SHOULD BE REVERSED* FOR THIS CASE IS WITHOUT RECORD SUPPORT, BASIS OR PRECEDENT

The second point relied upon by petitioner in support of its Petition is the argument that this Court should relieve the Court of Appeals from the *Erie* doctrine for the purpose of this case in order that the Circuit may decide what Utah state law should be.[12] There is absolutely nothing in the record to support this contention; nor is there any precedent or other basis for it. Simply stated, Petitioner just doesn't like Utah substantive law as decreed by the Utah Supreme Court. That is certainly no basis for issuing the writ which Petitioner seeks. Moreover, this seemingly specious argument is made for the first time by Petitioner in the present Petition. Not so much as a hint of this new contention can be found in the record, either before the District Court or before the Court of Appeals. The argument must be rejected for lack of any support and in light of the long-standing rule of this

---

[10] Petition, p. 15.

[11] 304 U.S. 64 (1938).

[12] Petitioner concedes that the Circuit Court was bound by *Erie* to follow and apply Utah substantive law, as decreed by the Utah Supreme Court. (Pet'n., p. 14).

Court that contentions not made before the District Court or the Court of Appeals, but made for the first time on a Petition for a Writ of Certiorari will not be considered.[12]

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that Sanders' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

---

[12] *Adikes v. S. H. Kress Co.*, 398 U.S. 144 (1970); *Lawn v. United States* 355 U.S. 339, 362-363; *Owens v. Union Pac. R. Co.*, 319 U.S. 175 (1943), cert. denied 323 U.S. 740 (1944); *Husty v. United States*, 282 U.S. 694, 701-702 (1931).

Respectfully submitted,

Clifford L. Ashton
Haldor T. Benson
Counsel for Respondent

APPENDIX "A"

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Consolidated Cases

Nos. 73-1714, 73-1715, 73-1716

HARDY SALT COMPANY,
Plaintiff-Appellant,

SANDERS BRINE SHRIMP
Plaintiff-Appellant,

MORTON-NORWICH PRODUCTS, INC.
Plaintiff-Appellant,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant-Appellee,

GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the District of Utah, Central Division (D.C. Nos. C-371, C-320-70 and C-295-72)

J. Thomas Greene, Salt Lake City, Utah (Gifford W. Price of Greene and Nebeker, Salt Lake City, Utah, and F. William McCalpin, of Counsel, St. Louis, Missouri, were on the brief), for Plaintiff-Appellant Hardy Salt Company.

Frank J. Allen of Clyde, Mecham & Pratt, Salt Lake City, Utah, for Plaintiff-Appellant Sanders Brine Shrimp Company.

Frank A. Wollaeger, Chicago, Illinois (Hardin A.

Whitney and John W. Horsley of Moyle & Draper, Salt Lake City, Utah, and Paul D. Frenz of McBride, Baker, Wienke & Schlosser, Chicago, Illinois, were on the brief), for Plaintiff-Appellant Morton-Norwich Products, Inc.

Clifford L. Ashton, Salt Lake City, Utah (Haldor T. Benson, Salt Lake City, Utah, was on the brief), for Defendant-Appellee Southern Pacific Transportation Company.

Claron C. Spencer, Salt Lake City, Utah (Richard G. Allen of Senior & Senior, Salt Lake City, Utah, was on the brief), for Intervenor-Defendant-Appellee Great Salt Lake Minerals & Chemicals Corporation.

Amici Curiae, The United States of America and The State of Utah submitted briefs.

Before DURFEE,* Senior Judge, and HOLLOWAY and BARRETT, Circuit Judges.

HOLLOWAY, Circuit Judge.

These consolidated appeals seek reversal of a judgment of the District Court dismissing the appellants' actions for damages and injunctive relief for injuries claimed to result from the construction and operation of a causeway across the Great Salt Lake of Utah by appellee Southern Pacific Transportation Company.

In 1956 the State of Utah granted Southern Pacific an easement across the Lake for railroad purposes. In 1959 Southern Pacific completed construction of the rock and earth fill causeway which separated the northern one-third of the Lake from the southern two-thirds.

The causeway is approximately 12.8 miles in length and contains only two 15-foot culvert openings to allow for circula-

---

* Of the United States Court of Claims, sitting by designation.

tion between the two arms of the Lake. The total fill causeway has created a static head water surface differential between the south and north arms of the Lake, causing the water to be about 17 inches to 22 inches higher on the south than the north. The differential has caused the migration of thousands of tons of salt from the south to the north, resulting in an increasing concentration of salt in the north lake and the dilution of brines in the south lake. Approximately 95 per cent of the total water flowing into the Lake enters the south lake, further contributing to the build up of the static head differential and moving the salt northward.

Appellants Hardy Salt Company (Hardy) and Morton-Norwich Products, Inc. (Morton) are engaged in the business of extracting sodium chloride (salt) from the waters of the Lake. The proof of Hardy and Morton showed the following facts.

Morton and Hardy operate under royalty agreements with the State of Utah for the extraction of salt from the Lake. The processing plants and related facilities of both companies are located along what is now the south arm of the Lake. Since the brine in the south arm is becoming more dilute each year, more water must be evaporated to recover the same quantity of salt. This has required the acquisition of land for additional concentrating ponds and increased the costs of production. Essentially it is these difficulties and increased costs resulting from them that Hardy and Morton complain of.

Appellant Sanders Shrimp Company (Sanders) is in the business of harvesting brine shrimp and shrimp eggs from the Lake and selling them as tropical fish food. Sanders' proof showed the following facts.

Sanders has a 1970 ten-year contract with the Utah State Division of Fish and Game giving Sanders the full and exclusive

right to seine for and harvest brine shrimp and brine shrimp eggs in two designated areas south of the causeway, it being stipulated that another company is permitted to collect up to 10,000 pounds of brine shrimp annually from one of the two areas. Also Sanders has an annual seining permit from the State.

The described changes in salinity of the two arms of the Lake have affected the brine shrimp and their eggs. With the increased salinity in the north arm, the shrimp can no longer survive there. Although the south arm provides a suitable environment, the decreased salinity has caused them to adjust the density of their eggs to the lower density of the water. More worthless egg shells are produced and there is a lessening supply of shrimp eggs available for collection by normal methods. And a lower percentage of the eggs which can be harvested by normal methods are viable.

Hardy and Sanders brought their suits for injunctive relief and damages in the State Court, based on claims of public and private nuisance, waste, interference with business interests and like theories. Morton brought its action in the Federal District Court, asserting only a claim under the Rivers and Harbors Act of 1899, 33 U.S.C.A. §§ 401, et seq. The Hardy and Sanders suits were removed to the Federal District Court on diversity grounds, and the suits were all consolidated for trial later. Hardy then also asserted a claim for relief under the Rivers and Harbors Act. Before trial appellee Great Salt Lake Minerals & Chemicals Corporation, which is engaged in recovering salt from the north arm of the lake, was permitted to intervene as a party defendant, asserting that any significant dilution of the concentrated brine in the north arm would adversely affect its operations.

After completion of the plaintiffs' proof, Southern Pacific moved to dismiss. The District Court sustained the motion, made

findings and conclusions adverse to the plaintiffs and dismissed the action.

The Court found that neither the royalty agreements between the State of Utah and Hardy and Morton, nor the seining permits granted to Sanders, purported to grant exclusive rights to remove salt or brine shrimp or shimp eggs fom the Great Salt Lake, and that the agreements did not purport to guarantee any given salinity of the waters in the entire lake or any part of it. The Court held that under Morton International, Inc. v. Southern Pacific Transportation Co., 495 P.2d 31 (Utah) cert. denied, 409 U.S. 934, the royalty agreements held by Hardy and Morton were nonexclusive in nature, and that because of this fact neither Hardy nor Morton could recover for any damages resulting from diminution of the salt content in the south arm.

The Court concluded also that Sanders has nothing more than a nonexclusive license to fish and, therefore, under the *Morton* opinion, Sanders has no cause of action against Southern Pacific for any damages resulting from diminution of the brines of the south arm, or the strengthening of the brines of the north arm that may be due to construction of the causeway.

Hardy, Morton and Sanders all appeal. We treat first the State law claims of nuisance, waste, interference with business interests and like theories, and will later consider the Federal claims under the Rivers and Harbors Act.

1. The State law claims of nuisance, waste, interference with business interests and like theories.

Applying State law to the diversity claims as required by Erie R. Co. v. Tompkins, 304 U.S. 64, the District Court relied primarily on Morton International, Inc. v. Southern Pacific Trans-

portation Co., 495 P.2d 31 (Utah), cert. denied, 409 U.S. 934, in denying relief sought on State law claims. The case must be carefully considered.

The *Morton* case involved State law claims similar to those of Hardy and Sanders and concerned injury from the same causeway. Morton's claims were premised on "diligence rights" which are not clearly defined in the opinion. Before Utah law provided for applications for certificates for water appropriation, such as obtained by Hardy, such diligence rights described the right to take water obtained by a continued beneficial use. See Hanson v. Salt Lake City, 205 P. 2d 255 (Utah); Hague v. Nehi Irrigation Co., 52 P. 765, 768 (Utah). However, the source of the right does not appear dispositive in the case. The Utah Supreme Court in fact referred to Morton's failure to have made application for appropriation of water under Title 73 and 65-1-15, Utah Code Annotated (1953), but said that this was not dispositive. The reasons for denial of relief to Morton were spelled out by the Court as follows:

> What we *do* think is important and dispositive here, is the question of who owns the salt in solution in the waters of the lake. Although there was some question about this important matter before 1946, there was none thereafter, since we held in a somewhat similar case that "the salt . . . is contained within Great Salt Lake, which is a navigable body of water. Because it is a navigable body of water its bed belongs to the state subject to the control of Congress for navigation in commerce. . . . It is our opinion that the state as the owner of the beds of navigable bodies of waters is entitled to all valuable minerals in or on them," — such conclusion being affirmed and established by the U.S. Supreme Court in the most recent decision of June 6, 1971.
>
> . . .

* * *

> . . . It is obvious that plaintiff's right to divert and precipitate the salt is a nonexclusive right, and that no matter what you call it, — a diligence right, a license, a profit a prendre, a lease, or a contract to sell, — the right is circumscribed by the provisions of Title 65-1-15, U.C.A. 1953, reserving to the State the salt in the water, to "be *sold* by the state land board *only* upon a royalty basis." The plaintiff's agreement with the State of September 1954, among other things, provides for and requires the payment of so much per ton for salt processed.
>
> The State owning the salt and plaintiff having but a nonexclusive right to extract and process it, the basic question remains as to whether construction of the railroad's causeway, which concededly diluted the water of its salt content in the so-called South Lake, created a compensable claim against the railroad in favor of plaintiff, concededly damaged in the sense that dilution of the water it diverts will cost more in the salt reduction process. We think there is no compensable claim here because plaintiff has no exclusive right against the State or others to the salt or the water from which it is converted, has no right given by the State to divert the water at any *specific* point. It can do so at any available point along the lake, either south or north of the causeway, has no vested claim to a beneficial use of the water, has filed no claim for mineral rights, and could, but for the expense involved, divert water as well from any point on the lake where the salt in solution may exceed that in the South Lake. 495 P.2d at 32-33.

It is thus apparent that regardless of the label of the right involved, the basic statute reserved to the State the salt and the water to "be sold by the state land board only upon a royalty basis." And since Morton could only have a nonexclusive right to take salt, it had no interest entitling it to injunctive relief or damages for injury from salinity changes resulting from the causeway.

On this appeal both Hardy and Sanders argue that for several reasons the *Morton* case does not apply. First Hardy says that the rights granted to it by the State differ sufficiently from Morton's rights to distinguish the case. Hardy's rights include: (1) certificates of water appropriation which provides that as appropriator Hardy is entitled to the use of water for diversion and use, including the certificate stating that "the water is, during the above-mentioned periods, intermittently diverted and used through evaporation of said water to yield 80,500 tons of salt each year . . ." (Hardy Exs. 87, 88); (2) a pre-causeway royalty agreement (Hardy Ex. 83); (3) a specific easement granted by the State to extract brine from the Great Salt Lake through a channel at a specific point of diversion (Hardy Ex. 82) onto ponds on its fee lands (Hardy Ex. 80) and lands leased to the company by the State (Hardy Ex. 81).

On the other hand Morton, although possessing a royalty agreement, had only diligence rights rather than a certificate like Hardy's for appropriation of water.[1] And Morton had no point of diversion specified by the State and no indication of the quantity of salt Morton could extract from the Lake.

In the *Morton* opinion the Utah Supreme Court referred, Id. at 32, to Utah Code Annotated § 65-1-15 (1953), which provides:

> Salts and other minerals in the waters of navigable lakes and streams are likewise reserved to the state and shall be sold by the state land board only upon royalty basis. The amount of such royalties and the terms of such contracts shall be determined by the board; provided, that all such contracts shall be subject to the use of the waters for public purposes, and provided further that before

[1] Morton did have a written agreement with the State, executed in 1954, giving it the continuing right to appropriate, remove and divert water of and from the Great Salt Lake for the purpose of extracting salt therefrom. See 495 P.2d at 32.

> executing a contract which contemplates the recovery of salts and minerals from said waters, the state land board shall require evidence that an application for the appropriation of water for such purpose has been filed with the state engineer and is pending in his office.

We feel the statute makes clear that the basic source of both Morton's and Hardy's right to take salt is the royalty agreement, provided for by the statute. Thus the efforts to distinguish *Morton* on the basis of other agreements and circumstances are not persuasive. We feel that *Morton* simply held that because the State owned the salt and Morton had only a nonexclusive right to extract and process it under the royalty agreement recognized by the statute, Morton had no interest entitling it to injunctive relief and damages.

Unlike Morton, Hardy does have a specific point of diversion for its water, but any person entitled to the use of water in Utah may change the place of diversion on application to the State Engineer, absent substantial impairment of vested rights. See Utah Code Annotated § 73-3-3.

Hardy points out also that the grant of easement issued by the Utah state land board to Southern Pacific provided that the ". . . grantee agrees to compensate surface owners or lessees for all damages done during construction of the railroad and during its subsequent operations." Hardy argues that it is within the class protected and benefited by the contractual obligation as an owner as well as a lessee of real property at the southern end of the Lake where its extraction facilities are located.

While Morton did not urge that proposition on its appeal to the Utah Supreme Court, this provision in the easement was considered by the Court, 495 P.2d at 34:

> . . . [N]o point on appeal was urged for the contention that plaintiff was a "surface owner," although a point was made in essence that it was a "lessee," — which later we have said has no merit. We are not called upon to determine whether Morton is a "surface owner" or not, but we are constrained to observe that we think such appellation does not apply to those incidentally damaged by water dilution, but at best to damage of some tangible existing physical property or facility owned by anyone, whether he has rights to remove salt water or not.

It is clear that the statement was dictum. Nevertheless, "[t]he responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it." Yoder v. Nu-Enamel Corp., 117 F.2d 488, 489 (8th Cir.). Both the holdings and considered dicta of the State Courts should be applied. See Hawks v. Hammill, 288 U.S. 52, 59; Yoder v. Nu-Enamel Corp., supra at 489; Hartzler v. Chesapeake and Ohio Railway Co., 433 F.2d 104, 107 (7th Cir.). Moreover, on the unsettled peripheral questions of State law, the views of the resident District Judge are persuasive and ordinarily accepted. Sade v. Northern Natural Gas Co., 483 F.2d 230, 234 (10th Cir.); Vaughn v. Chrysler Corp., 442 F.2d 619 (10th Cir.), cert. denied, 404 U.S. 857; Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir.). Thus we are persuaded that the statement of the Utah Supreme Court calls for rejection of Hardy's contention based on the provision in the Southern Pacific easement.

Hardy next argues that a denial of its right to recover would be violative of the Utah Constitution and that application of the *Morton* decision to the Hardy case would be State action in violation of the United States Constitution. We find no merit to these constitutional claims. Hardy has had full access to the Federal Courts, asserting fully its State and Federal claims. The rejec-

tion of its theories was based upon a State Court decision, and we cannot say the determination denied its substantive or procedural constitutional rights.

Hardy argues that undue interference with its economic and business interests is actionable and that even if its rights are denominated as merely a nonexclusive privilege or license, the *Morton* decision did not reach the issue of such interference. We again must disagree. The interference with business interests was the precise injury that Morton complained of in its State Court suit. And the rejection of such claims of interference with Morton's business was based upon the principle that only a nonexclusive right to extract salt existed under the royalty agreement and § 65-1-15 of the Utah statutes providing for royalty agreements and the taking of salt. We must agree that Hardy's rights can rise no higher since they come from the same basic source as those of Morton.

In addition, both Hardy and Sanders argue that Southern Pacific has created a public nuisance and that they may recover because of special injuries sustained as a result thereof. They say this issue was not before the Utah Supreme Court in *Morton*, and that the chemical alterations produced by the causeway violate the Utah antipollution statutes.[2]

In support of such theories, the plaintiffs' evidence showed that the ecological effects of the causeway are considerable. Prior to its construction the color of the entire lake was the same. Sub-

---

[2] Reliance is placed on §§ 73-14-2(a), 73-14-5(a) and 76-43-3(3). Section 73-14-2(a) provides:

> "Pollution" means such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, or such discharge of any liquid gaseous or solid substance into any waters of the state as will create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

sequently the north arm became reddish and the south arm green. This occurred because the increased salinity in the north lake affects aquatic life other than the brine shrimp. Blue-green algae that form algal reefs in the north lake have apparently been completely killed. Red algae have replaced the green algae in the more saline waters of the north lake as the water has approached the saturation point.

Before the causeway's construction the overall current of the lake was counterclockwise and its specific gravity ranged from 1.17 to 1.19. After the construction the circumstances in both segments of the Lake remained counterclockwise, but without exchange due to currents which previously occurred between the north and south arms. The specific gravity in the north arm now ranges from 1.21 to 1.23, which causes the salt to drop to the bottom. The specific gravity of the south arm varies from 1.09 to 1.19. Thus, while the District Court made no finding on the issue, the plaintiffs' proof was substantial that Southern Pacific has caused pollution creating a public nuisance.

Under Utah law the plaintiff must suffer some substantial injury or damage not inflicted on the community at large in order to recover on a public nuisance theory. Lewis v. Pingree National Bank, 151 P. 588, 561 (Utah); see also Riggins v. District Court of Salt Lake County, 51 P.2d 645, 662 (Utah). Both Hardy and Sanders made a substantial showing of special and peculiar injuries of business interference, not common to the rest of the community. However, again the reasoning in *Morton* applies. The Utah Supreme Court referred to the change in salinity, which is the basic premise of the injury claim. "It is this dilution about which this litigation revolves." 495 P.2d at 32. While nuisance claims were not asserted or discussed, the Court held there was an absence of a protectable business inter-

est premised on a certain salinity level in the Lake. Again we must agree with the District Court that the plaintiffs must be denied relief.

The claims of Sanders are likewise untenable. As stated above, it is true that under its contract with the State, Sanders does have an exclusive right to seine and harvest in two designated areas, one other company having a right to collect a limited amount of shrimp in one of the two areas. However, Sanders' rights to seine and harvest are only a right to reduce to possession and therefore are analogous to a profit a prendre and other like rights mentioned in the *Morton* opinion. 495 P.2d at 33. Again, like Morton and Hardy, Sanders' rights do not create a protectable business interest premised on a certain salinity level in the Lake under the reasoning of the *Morton* case. Id. It would seem that there should be relief against violation of the anti-pollution statute which prohibits damage to aquatic life, Utah Code Annotated § 73-14-2, which damage was shown by Sanders clearly as to its operations in the north arm of the Lake where the shrimp can on longer survive. We feel, however, that the rights of Sanders still come within the rationale of the *Morton* opinion and that the District Court did not err in deciding that Sanders lacked an enforceable right.[2]

Hardy and Sanders also invoke Utah's private nuisance statute, Utah Code Annotated § 78-38-1, and the Utah waste statute, Utah Code Annotated § 78-38-2. On the reasoning dis-

---

[2] It is t[rue] the Utah Supreme Court did uphold the right of a private party to obt[ain] against water contamination on a nuisance theory in North Point Con[sol.] Irrigation Co. v. Utah & Salt Lake Canal Co., 52 P. 168 (Utah). See [also] Reeder v. Brigham City, 413 P.2d 300 (Utah). The plaintiff irrigation company complained that defendant canal and irrigation companies had no right to contaminate canal waters, thus rendering them unfit for domestic and irrigation purposes served by the plaintiff. The Court held that on the record the plaintiff was entitled to injunctive relief. However, in the opinion there is no discussion of exclusivity vel non of the plaintiff's rights. And, in any event, the recent *Morton* decision, involving the same injuries produced by the causeway, must be followed as the more compelling authority.

cussed above, we must again hold that Hardy and Sanders do not demonstrate the type of a business or economic interest entitling them to relief.

In sum, we must hold that the District Court did not err in denying relief on the State law claims in light of Morton International, Inc. v. Southern Pacific Transportation Co. and the parallel circumstances involved here.

2. The Federal claims under the *Rivers and Harbors Act.*

In addition to the State law claims asserted by Hardy and Sanders, Hardy and Morton assert a federal claim against Southern Pacific based on alleged violation of the Rivers and Harbors Act of 1899, 33 U.S.C.A. §§ 401, et seq., by Southern Pacific. Specifically, they allege that Southern Pacific violated §§ 9, 10, and 13 of that Act, 33 U.S.C.A. §§ 401, 403, and 407,[4] in that

---

[4] 33 U.S.C.A. § 401 provides:

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: PROVIDED That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced . . . .

33 U.S.C.A. § 403 provides:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States,

the Railroad never received the consent of Congress or, alternatively, of the legislature of the State of Utah, nor any authorization or approval from the Secretary of the Army or the Chief of Engineers, for construction or maintenance of its causeway as those provisions variously require. The record establishes that such approvals and authorizations were not obtained (R. 443-46, 597, 1288-92). Although the Rivers and Harbors Act does not expressly create private causes for those injured by its violations, Hardy and Morton argue that such a cause of action should be implied in their favor, entitling them to injunctive relief and damages.

Southern Pacific and the Intervenor, Great Salt Lake Minerals & Chemicals Corporation, contend that the Rivers and Harbors Act does not apply because the Great Salt Lake is not a "navigable water of the United States" within the terms of that Act. They further argue that, even if the Rivers and Harbors Act applies, Hardy and Morton have no standing to complain of the violations alleged and that no private right of action may be implied under the Act in favor of Hardy and Morton since their claims are unrelated to interference with rights of navigation and are thus beyond the special federal interest and protection afforded by the Act. Finally, Southern Pacific says that, in any event,

---

unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C.A. § 407 provides:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; . . . . AND PROVIDED FURTHER, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

the judgment in Morton International, Inc. v. Southern Pacific Transportation Co., supra, bars the federal claim of Morton under the Act, arguing that Morton has attempted to split its cause of action related to injury from the causeway.

At trial Morton offered in evidence newspaper articles as ancient documents in support of its claim that the Great Salt Lake is a "navigable water of the United States." (Ex. M-28 through M-34). These articles, published in the late 1800's, described a flow of commercial navigation across the Lake up the Bear River to Corinne, Utah, an important rail center at the time. Although the Bear River flows interstate, no offer of proof was made to the effect that it was navigable interstate. Instead, Hardy and Morton say that they proved that the Great Salt Lake is a navigable water of the United States by demonstrating that it served as a link in the conduct of interstate commerce, namely as a conduit for the transport of goods which were subsequently shipped interstate via rail from Corinne. The District Court refused to admit the proffered newspaper articles (Tr. 585) and indicated that it would not consider proof that the Bear River was navigable (Tr. 575).

The District Court took judicial notice that the Bear River is not navigable by its findings of fact. The Court's conclusions of law stated that the Great Salt Lake is a navigable body of water of the State of Utah as such, the Rivers and Harbors Act is not applicable to the Great Salt Lake; and that the bed of the Lake and the waters over the said bed and the minerals contained in said waters belong to the State of Utah. Accordingly, the Court dismissed Hardy's and Morton's claims under the Act with prejudice.

On this appeal Hardy and Morton both contend that the District Court erred in excluding the exhibits showing the navi-

gation to Corinne; that the Court should have admitted the proof and found that the Great Salt Lake is a navigable water of the United States under the Act; and they ask that the judgment be reversed and the case remanded for further trial.

We must consider the exclusion of the offer of proof of navigation across the Lake and up the Bear River to the railhead at Corinne. More specifically, our question is whether there was a showing attempted that could properly establish the Great Salt Lake is a navigable water of the United States *within the meaning of the Rivers and Harbors Act.* We feel that the *proof should have been admitted and considered on this issue.* Nevertheless, we conclude that there was no reversible error, *since the proof offered showed only a connection with the railhead* and not with navigable interstate waters and, therefore, as a matter of law, could not establish that the Lake is a "navigable water of the United States" within the meaning of the Act.

The phrase *"navigable water of the United States"* has been used by Congress in several statutes prior to the 1899 Act, e.g., Act of July 7, 1838, ch. 191, 5 Stat. 304; Act of September 19, 1890, ch. 907 §§ 6-8, 26 Stat. 453-454. The term, as used in the Act of 1838, cited above, was defined in The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). The Supreme Court there stated that:

> . . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition *by themselves, or by uniting with other waters, a continued highway over*

> *which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.* (Emphasis added)

See also The Montello, 78 U.S. (11 Wall.) 411, 415 (1870); and Escanaba Co. v. Chicago, 107 U.S. 678, 682 (1882).

Although the definition of "navigability" laid down in The Daniel Ball has subsequently been modified and clarified, see, e.g., The Montello, 87 U.S. (20 Wall) 430 (1874); Leovy v. United States, 177 U.S. 621 (1900); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940), its definition of "navigable waters of the United States," insofar as it requires a navigable interstate linkage by water, appears to remain unchanged. See Economy Light & Power Co. v. United States, supra, at 121-124; United States v. Utah, 283 U.S. 64, 75 (1931); United States v. Crow, Pope & Land Enterprises, Inc., 340 F.Supp. 25, 31-36 (N.D. Ga. 1972), appeal dismissed, 474 F.2d 200 (5th Cir. 1973). Cf. the recent cases which have uniformly refused to find landlocked intrastate lakes navigable waters of the United States within the admiralty jurisdiction. Doran v. Lee, 287 F.Supp. 807 (W. D. Pa. 1968); In re Builders Supply Company, 278 F.Supp. 254 (N.D. Iowa 1968) (and cases therein cited). Cf. also Johnson v. Wurtman, 227 F.Supp. 135 (D. Ore. 1964) (reaching similar result, but purportedly under the commerce clause).

We realize that the construction of "navigable water of the United States" made in The Daniel Ball and The Montello may be viewed as involving a statute depending on the admiralty power, while the Rivers and Harbors Act is an exercise of power under the commerce clause. See United States v. Crow, Pope & Land Enterprises, Inc., supra. Nevertheless, The *Daniel Ball* was

a landmark decision and its interpretation of *"navigable water* of *the United States,"* adhered to in The Montello and Escanaba Co. v. Chicago, supra, was well settled at the time of the enactment of the 1899 statute. It was the interpretation given to "navigable water of the United States" as used in the 1890 Rivers & Harbors Act, a predecessor of the 1899 Act, see 21 Op. Att'y. Gen. 430, 432-33 (1896). When Congress uses words in a statute without defining them, and those words have a judicially settled meaning, it is presumed that Congress intended them to have that meaning in the statute. E.g., Case v. Los Angeles Lumber Co., 303 U.S. 106, 115 (1939); The "Abbotsford," 93 U.S. 440, 444 (1878). We may assume that the Congress was aware of these decisions and of the interpretation which they had placed upon the phrase "navigable water of the United States" so that if it had intended the Act of 1899 to employ a broader definition, it would have manifested such an intention by clear and explicit language. See Cummings v. Chicago, 188 U.S. 410, 430 (1903); compare Federal Power Act § 3(8), 16 U.S.C.A. § 796(8); Act of February 4, 1887, ch. 104, 24 Stat. 379. In the absence of any such language it should not be assumed that any such departure was intended.

We are aware, however, of the dictum in The Katie, 40 F. 480 (S.D. Ga. 1889), affirmed *sub nom* In re Garnett, 141 U.S. 1 (1891), which appears to adopt a broader interpretation of navigable waters, lending support to the position of Hardy and Morton. The trial court there stated that if navigable waters lying wholly within a State are utilized under common control in connection with railroads for continuous carriage in interstate commerce, they would become public waters of the United States, subject to congressional control under the commerce clause. 40 F. at 489.

The dictim was not discussed by the Supreme Court opinion affirming the decision and no subsequent case has been found which refers to it. In these circumstances, we feel that the predominant interpretation was that settled in the Supreme Court's decisions in The Daniel Ball and cases following it.

Hardy and Morton contend that the first proviso in Section 9 of the Act, 33 U.S.C.A. § 401, which speaks in terms of "waterways the navigable portions of which lie wholly within the limits of a single State," indicates a congressional intent to give a broad definition to navigable water of the United States, one which would clearly encompass the Great Salt Lake. We believe that the more reasonable construction of this provision is that it refers to waters which fall within the definition laid down in *The Daniel Ball,* but which lie wholly within a single State. In light of the history behind the Act, it seems more likely that this proviso was intended to make clear the limits of the concurrent authority of the States over navigable waters of the United States, as defined by The Daniel Ball, than to expand the scope of the definition of "navigable water of the United States" as used in the Act. See Lake Shore & Michigan Southern Railway Co. v. Ohio, 165 U.S. 365 (1897); Cummings v. Chicago, 188 U.S. 410 (1903).

Hardy and Morton also contend that the decree entered in the case of Utah v. United States, 406 U.S. 484 (1972)[5] supports their contention that the Great Salt Lake is a navigable water of the United States.[6] We do not agree. On its face the decree does

---

[5] See also the proposed decree appended to the election in Utah v. United States, 403 U.S. 9, 13 (1971).

[6] That decree provides in pertinent part:

> The United States of America, its departments and agencies are enjoined, *subject to any regulations which the Congress may impose, such as in the interest of navigation or pollution control,* from asserting against the State of Utah any claim of right, title, and interest:
>
> (a) to the bed of the Great Salt Lake . . . . (Emphasis added)

nothing more than acknowledge the potential possibility of regulation of commerce on the Great Salt Lake. It contains no implication whatsoever that the Congress has already chosen to regulate the Lake under the Rivers and Harbors Act.

We conclude that a navigable water of the United States within the meaning of Sections 9, 10 and 13 of the Rivers and Harbors Act must be construed in line with the interpretation in The Daniel Ball, as contemplating such a body of water forming a continued highway over which commerce is or may be carried on with other states or foreign countries, by water. Thus we must hold that the District Court did not err in dismissing the federal claims of Hardy and Morton founded on the Act. Their offer of proof was insufficient to demonstrate that the Great Salt Lake is a navigable water of the United States within the meaning of the statute, showing only navigability within Utah to the railhead.

We feel we should not rest our decision on the broader views on the Rivers and Harbors issue expressed in the District Court's conclusions of law, and limit our decision as stated herein.[7]

We need not and do not decide whether the Lake could be shown to be such a navigable water under the Act by other proof in another case. And we need not and do not decide whether the Congress could constitutionally regulate commerce on the Lake. Finally, deciding this case as we do on the issue of whether the Lake is a navigable water of the United States, we do not reach the other points raised by the parties on this claim and we express no opinion on them.

---

[7] We believe it was error for the District Court to find, by judicial notice, that the Bear River is not navigable, in view of the offer of proof on navigability up to Corinne. However, in view of the insufficiency of the proof offered, as discussed above, no question of fact or law on the navigability of the Bear River requires consideration.

Concluding that the District Court committed no reversible error in the dismissal of the federal claims under the Act, or in dismissal of the State law claims discussed earlier, the judgment is affirmed.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS IN THE TENTH CIRCUIT

Nos. 73-1714, 73-1715, 73-1716
Consolidated Cases

HARDY SALT COMPANY,
Plaintiff-Appellant,
vs.
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant-Appellee,
GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION,
Intervenor Defendant.

SANDERS SHRIMP COMPANY,
Plaintiff-Appellant,
vs.
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant-Appellee.

MORTON-NORWICH PRODUCTS, INC.,
Plaintiff-Appellant,
vs.
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant-Appellee.

PETITION FOR REHEARING

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, petitioner Sanders Brine Shrimp Company respectfully petitions the Court for rehearing of the appeal of said petitioner in this matter. This petition is based upon the following grounds:

1. This Court and the United States District Court for the District of Utah both ruled that petitioner herein had no enforceable claim because, under the doctrine of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), petitioner's claims were governed by the decision of the Supreme Court of the State of Utah in the case of *Morton International vs. Southern Pacific Transportation Co.,* 495 P.2d 31 (1972).

2. The Supreme Court of the State of Utah in *Morton International vs. Southern Pacific Transportation Co., supra,* apparently ruled that absent an exclusive contractual or other right to take benefit from the waters of the Great Salt Lake, there could be no recovery for any damages or other claims arising out of the decrease in salinity of the lake due to construction of a railway causeway by the defendant Southern Pacific Transportation Company.

3. Both this Court and the District Court ruled that petitioner's rights and interest to the harvesting of brine shrimp and brine shrimp eggs were nonexclusive in nature and, therefore, under *Morton International vs. Southern Pacific Transpotation Co., supra,* petitioner had no enforceable claims. As this Court stated: "Sanders has only a nonexclusive seining license which must be renewed annually as the source of its right to take shrimp and shrimp eggs." (Opinion of the Court, p. 17) As a result, this Court affirmed the trial court's granting of defendant's motion to dismiss at the close of plaintiff's case.

4. The decisions of the District Court and this Court were both based on a misapprehension of certain critical facts. Sanders Brine Shrimp Company did in fact have an exclusive right to harvest brine shrimp and brine shrimp eggs as shown by the contract attached hereto as Exhibit "A" (R. 662, A. 9-10).

5. The contract provides in its first paragraph:

> "1. The Board hereby grants to Seiner *full and exclusive* right to seine for and harvest brine shrimp and brine shrimp eggs from the Great Salt Lake in the area described as follows:
>
> A. Beginning at a point directly north of Spray Siding along a line parallel to the southern and westerly shoreline of Great Salt Lake to the north boundary of the Wendover Bombing and Gunnery Range (about 2.2 miles directly south of the Lucin Cutoff), with the exception of the area starting at a point 500 feet north of the Solar Salt Company Intake Canal and extending southward to the northern tip of the Grantsville Sand Bar as shown in Exhibit A. (a distance of approximately 7 miles depending upon lake water levels).
>
> B. From the northern tip of Antelope Island south and southwest approximately 1 mile south of the Utah State Park and Recreation Division property as shown in Exhibit A." (emphasis added)

Similar contracts granting "full and exclusive" rights to harvest brine shrimp and brine shrimp eggs had been entered between the State of Utah and Sanders Brine Shrimp Company since 1955 (R. 665-673, A. 13-21).

6. Contrary to the language of these contracts, this Court apparently relied upon the findings of fact and conclusions of law of the trial court.

a) Finding of Fact No. 14 provided:

> "14. Neither the Royalty Agreements between the State of Utah and plaintiffs Hardy Salt Company and Morton-Norwich Products, Inc., nor the seining permits granted to Sanders Shrimp Company purport to grant exclusive rights to remove sodium chloride (salt) or brine shrimp or brine shrimp eggs from the Great Salt Lake, nor do they purport to guarantee any given salinity of the waters in the entire or any part of the Great Salt Lake." (emphasis added)

b) Conclusion of Law No. 7 provided:

> "7. Sanders Shrimp Company has nothing more than a non-exclusive license to fish on the Great Salt Lake and therefore, under the rationale of the *Morton International, Inc. v. Southern Pacific Transportation Company*, 27 U.2d 256, 495 P.2d 31 (1972), has no cause of action against defendant for any damages resulting from the diminution of the brines of the south arm of the Great Salt Lake or strengthening of the brines of the north arm of the Great Salt Lake which may be due to the construction of the causeway across the Great Salt Lake by defendant."

7. There was testimony in the record to the effect that annual seining permits granted to petitioner were not assignable and were granted annually (R. 400-401). Apparently Finding No. 14 was based on this testimony. The seining permits must, however, be distinguished from the underlying contractual interests and rights of petitioner, which, as clearly shown by the record, were exclusive. There is *no* evidence in the record that plaintiff's rights or business interests derived in any way from the seining permits.

8. In addition, the *Morton International* decision is further distinguishable from the case of petitioner in that the Utah Supreme Court specifically held that there was no compensable

claim when there was no right to the diversion of waters from the lake at any *specific* point (495 P.2d at 33). As clearly shown by Exhibit "A", petitioner did in fact have an exclusive right to the harvest of brine shrimp and brine shrimp eggs from the specific areas described in the contract.

9. Rule 40 of the Federal Rules of Appellate Procedure was designed to permit the correction of error based upon obvious misapprehension by the appellee court of basic and critical facts. Included is the power to extend and enlarge the time in which said petition may be filed. See *John Hancock Mutual Life Ins. Co. v. Welsh,* 269 F.2d 870 (5th Cir., 1959); *United States v. Certain Lands,* 420 F.2d 371 (2nd Cir., 1964); *Braniff Airways, Inc. v. Curtis-Wright Corp.,* 424 F.2d 427 (2nd Cir., 1970). The record in the instant case demonstrates that the failure of both this Court and the District Court to consider the exclusive nature of petitioner's contractual rights was critical and essential to the determination both in this Court and the District Court. Absent such a misapprehension the motion to dismiss would not have been granted and this Court would not have affirmed.

10. Petitioner respectfully submits that such arguments, while raised and argued previously (Brief of Sanders Brine Shrimp Company at 10, Reply Brief at 2), were not sufficiently brought to the attention of the Court and, therefore, the exclusive nature of petitioner's contract was perhaps misapprehended by the Court.

11. Petitioner moves herewith for an order enlarging time in which to file this petition for rehearing. Petitioner has recently associated new counsel and said counsel had no opportunity to review or examine both the decisions and the record of the case within the 14 day period provided for under Rule 40 of the Federal Rules of Appellate Procedure for the filing of petitions for rehearing.

12. Unless the time is enlarged, petitioner respectfully submits that severe damage will result to petitioner. The undisputed evidence at trial indicated and the opinion of this Court recognized that extensive damage has been suffered by petitioner (Opinion of the Court at 17). In addition, there is no prejudice to defendant Southern Pacific Transportation Company. Said defendant was aware of and had access to Exhibit "A" both prior to trial and during the appeal of this matter (see e.g. R. 606-608). Further, there could be no showing that there would be any prejudice to said defendant by an order granting an enlargement of time in which to file said petition for rehearing.

WHEREFORE, petitioner Sanders Brine Shrimp Company respectfully submits that the Motion for Leave to File a Petition for Rehearing out of time and for Enlargement of Time should be granted, that the Petition for Rehearing should be granted, and that upon rehearing, the judgment of the United States District Court for the District of Utah should be reversed.

Dated this 13th day of September, 1974.

CLYDE, MECHAM & PRATT
By .....
Frank J. Allen

PRINCE, YEATES, WARD, MILLER & GELDZAHLER
Kenneth W. Yeates
J. Rand Hirschi
By .....
Kenneth W. Yeates
Attorneys for Sanders Brine Shrimp Company

I hereby certify that the foregoing Petition for Rehearing is made in good faith and not for purposes of delay.

Kenneth W. Yeates

I hereby certify that a copy of the foregoing was mailed to J. Thomas Greene, of Greene and Nebeker, Counsel for Hardy Salt Company, Kennecott Building, Salt Lake City, Utah, 84111; to John W. Horsley of Moyle & Draper, Counsel for Morton-Norwich Products, Inc., Deseret Building, Salt Lake City, Utah, 84111; to Clifford L. Ashton and Haldor T. Benson, of Van Cott, Bagley, Cornwall & McCarthy, Counsel for Southern Pacific Transportation Company, 141 East First South, Salt Lake City, Utah, 84111; and Claron C. Spencer and Richard G. Allen, of Senior & Senior, Counsel for Great Salt Lake Minerals & Chemicals Corporation, Newhouse Building, Salt Lake City, Utah, 84111, on this 13 day of September, 1974, with postage prepaid thereon.

Kenneth W. Yeates

EXHIBIT "A"

R-662

CONTRACT

In consideration of the mutual covenants herein contained, the undersigned parties, the Utah State Board of Fish and Game, hereinafter referred to as the "Board" and the Sanders Brine Shrimp Company, hereinafter referred to as "Seiner" hereby contract, covenant, and agree as follows:

1. The Board hereby grants to Seiner full and exclusive right to seine for and harvest brine shrimp and brine shrimp eggs from the Great Salt Lake in the area described as follows:

A. Beginning at a point directly north of Spray Siding along a line parallel to the southern and westerly shoreline of Great Salt Lake to the north boundary of the Wendover Bombing and Gunnery Range (about 2.2 miles directly south of the Lucin Cutoff), with the ex-

ception of the area starting at a point 500 feet north of the Solar Salt Company Intake Canal and extending southward to the northern tip of the Grantsville Sand Bar as shown in Exhibit A. (a distance of approximately 7 miles depending upon lake water levels).

B. From the northern tip of Antelope Island south and southwest approximately 1 mile south of the Utah State Park and Recreation Division property as shown in Exhibit A.

2. Seiner agrees that the exclusive right and authority granted herein shall apply solely to the harvest of brine shrimp and brine shrimp eggs heretofore referred and that any authority as to the use of the land area herein described is granted subject to any and all regulations of the State of Utah.

3. Full and exclusive right to seine for brine shrimp and brine shrimp eggs from the Great Salt Lake in the area described above is granted with the stipulation that Pioneer Enterprise, Dunsmuir, Califorinia, shall be permitted to collect up to a maximum of 10,000 pounds of brine shrimp annually from the area described in 1 A.

4. Seiner agrees that all activities conducted by it shall be conducted in compliance with the rules and regulations promulgated by the Utah State Division of Fish and Game and more specifically pursuant to the annual seining proclamation of said Division but not limited thereto.

5. The parties agree that this agreement shall continue for a duration of ten years from the date of this instrument provided, however, that this agreement shall be terminated by the Board in the event the Seiner does not pursue and harvest brine shrimp and brine shrimp eggs conscientiously. In addition, the agreement shall be terminated in the event of violation of any rules and regulations promulgated by the Utah State Division of Fish and

Game. The parties agree that Seiner may obtain an option to renew the authority granted to it provided that the parties shall mutually agree upon such renewal.

IN WITNESS WHEREOF the parties have hereonto set their hands this 20th day of August, 1970.

WITNESS:

By .....

APPROVED AS TO FORM
VERNON B. ROMNEY

By .....
Attorney General

By .....
Ford G. Scalley,
Assistant Attorney General

SANDERS BRINE SHRIMP COMPANY

By .....
Gail .... Sanders

UTAH STATE DIVISION OF FISH AND GAME

By .....
John E. Phelps,
Director

APPENDIX "C"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 73-1715

SANDERS BRINE SHRIMP COMPANY,
Plaintiff-Appellant

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant-Appellee

Appeal from the United States District Court
For the District of Utah, Central Division

REPLY BRIEF OF PLAINTIFF-APPELLANT

FRANK J. ALLEN
CLYDE, MECHAM & PRATT
351 South State Street
Salt Lake City, Utah 84111

instruments guaranteed any minimum salinity at Morton's intake or any exclusive right to lay salt. In essence, Morton complained the S. P. had laid so much salt that Morton's capacity to do so was reduced. Unless Morton's right to lay salt was exclusive or Morton was guaranteed a minimum brine quality, the court reasoned, Morton's *contractual* rights (the only rights asserted) were not violated.

The rights Appellant here asserts are not contractual, they are statutory. Appellant's licenses and easements from the state are merely an ingredient of the "property" devalued by Appellee's conduct, they are not the source of Appellant's rights. Appellants here asserts *public* rights, the public right proclaimed by statute that the public waters shall not be changed in their physical, chemical and biological characteristics to the detriment of industrial or recreational uses or aquatic life, the public right that public mineral, biological, and recreational resources shall be respected. It is the very *non*-exclusivity of these rights that imparts their public character.

Appellant relies on an abundance of cases (cited in its initial brief) where the property protected was an investment based upon mere non-exclusive, revocable, and short term licenses. Appellee cites no contrary authority.

POINT II

APPELLANT'S STANDING TO SUE DOES NOT DEPEND ON THE STATE OF UTAH'S "OWNERSHIP" OF GREAT SALT LAKE'S BRINE SHRIMP, BUT THE STATE HAS A SUFFICIENT PROPRIETARY INTEREST TO SUPPORT THE LICENSES IT USES

C3

UNIED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 73-1715

SANDERS BRINE SHRIMP COMPANY,
Plaintiff-Appellant

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant-Appellee

Appeal from the United States District Court
For the District of Utah, Central Division

BRIEF OF PLAINTIFF-APPELLANT

FRANK J. ALLEN
CLYDE, MECHAM & PRATT
351 South State Street
Salt Lake City, Utah 84111

[10]

Based on these findings, the trial court concluded that the Morton Decision was dispositive of the issues of the case and entered its judgment of no cause.

To the degree that the findings are relevant to the issues, they are incomplete and do not reflect the true import of the evidence. The uncontradicted testimony is that C. C. Sanders founded Sanders Brine Shrimp Company in about 1950 (T-390), that he continued to be active while his sons assumed more and more responsibility until 1965 (T-400), and that he sold and assigned the total business enterprise (real, personal, tangible and intangible property) to his sons who formed a partnership in 1966. The Court's finding, obviously supportive of a defense that Appellant commenced its operations with knowledge of the dike's effect on the lake's dynamics, is not reflective of the *significant* fact — that the family which formed the 1966 partnership had engaged in the brine shrimp venture for ten years before the dike emplacement and had already developed the technology, designed the plant, and made the investment necessary to make their business successful. The mere execution of partnership articles in 1966 is of no consequence in the case history.

The findings that Appellant has proceeded on annual seining licenses and grants of non-exclusive rights minimize the relationship between Appellant and the agencies of State Government which control the state's aquatic life resource. At the time the dike was commenced, and at the time of trial, agreements were in effect between Appellant and the State under which Appellant did have exclusive rights with regard to certain lake bed areas, and these agreements were for long terms (R 880, 883, 884A). We do not consider the exclusivity vel non of Appellant's harvest-

ing rights (in view of its long history of continuous successful operation) to be crucial in this proceeding. We emphasize, however, that the relationship between Appellant and the state, on the evidence, was not as tenuous and ephemeral as the finding would suggest, and the finding is out of accord with stipulated facts.

Even if the findings were truly reflective of the evidence, they do not justify the conclusion that Appellant has no cause of action "under the rationale" of the Morton Decision. The pleadings in *Morton* are not, of course, before this court, but we represent to the court that no cause based on (1) waste or (2) public nuisance by reason of water pollution was framed by the Morton pleadings. It is fully apparent from the language of the Morton Decision that the Utah Supreme Court was called upon to decide only:

> 1. Whether Appellee's construction of the dike in a manner which caused dilution of South Lake brine was a violation of any rights Morton could assert by virtue of riparian ownership or agreements with the State of Utah, and
>
> 2. Whether the instrument by which Appellee's easement for causeway construction was granted contemplated that Appellee must compensate littoral surface owners for financial losses attributable to dike-caused dilution.

Those issues were clearly resolved against Morton. The Morton Decision nowhere suggests, however, that the court was confronted with any evidence of the enormity of the change in the lake, the magnitude of the salt loss, or the damage to the ecology and recreational potential of the North Lake. Moreover, the Motron Decision is concerned